Supreme Court, U.S.
FILED
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No. 86-517

IN THE
SUPREME COURT OF THE UNITED STATES

OCTOBER 1986 TERM

GRAYDON ROGER BOLES,

PETITIONER

V.

T.E. ELLIS, T.D. COX &
DANNA MULLINNIX,

RESPONDENTS.

ON PETITION FOR A WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE FOURTH CIRCUIT

BRIEF OF RESPONDENT IN OPPOSITION TO PETITION

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Of Counsel:
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QUESTIONS PRESENTED

I. Did the Court of Appeals correctly refuse to hear petitioner's interlocutory appeal where the District Court did not direct entry of final judgment under Rule 54(b), Fed. R. Civ. P., nor enter a certification for interlocutory appeal under 28 U.S.C. §1292(b)?

II. Should this Court grant certiorari to review a decision by the Court of Appeals which did not depart from the usual and accepted course of judicial proceedings?

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OPINIONS BELOW

The Magistrate's Findings and Recommendation and Order entered on August 1, 1985 appears in petitioner's Appendix (A-1). The United States District Judge's Order entered on September 19, 1985, following the Magistrate's recommendations and dismissing respondent Mullinnix appears in petitioner's Appendix (B-1). The District Judge's Order entered on October 15, 1985 denying petitioner's request for reconsideration of the dismissal appears in respondent's Appendix (A 1). The District Judge's decision on February 24, 1986, not to hear petitioner's motion under Rule 60(b)(3), Fed. R. Civ. P., and hence refusing to reconsider the earlier dismissal, appears in petitioner's Appendix (C-1). The decision of the Court of Appeals for the Fourth Circuit of which petitioner

seeks review was decided April 11, 1986,[1] and appears in petitioner's Appendix (F-1). The Order of the Court of Appeals for the Fourth Circuit entered on June 2, 1986, denying petitioner's petition for rehearing appears in petitioner's Appendix (G-1).

STATUTES INVOLVED

28 U.S.C. §1291 (See Appendix, p. A 13).

28 U.S.C. §1292(b) (See Appendix, p. A 14).

Rule 54(b), Fed. R. Civ. P. (See Appendix, p. A 15).

STATEMENT OF THE CASE

On July 7, 1983, the petitioner filed a complaint, pro se, against the respondent Mullinnix alleging a conspiracy in violation

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[1]Petitioner incorrectly identifies the dismissal order as having been entered by the Fourth Circuit on May 15, 1986, but that apparently was the date that the Clerk's Office of the United States District Court for the Middle District of North Carolina received the appellate court's opinion and order dismissing the appeal.

of 42 U.S.C. §1985(3). Although the complaint was somewhat unintelligible, it appeared petitioner was asserting that respondent Mullinnix, a private citizen, had brought a "malicious charge" against petitioner as part of a conspiracy with co-defendants T.E. Ellis and T.D. Cox, two High Point, North Carolina, police officers who allegedly falsely arrested him.[2]

The respondent Mullinnix moved to dismiss the complaint pursuant to Rule 12(b)(6), Fed. R. Civ. P., on August 29, 1983, arguing that petitioner's complaint offered merely conclusory allegations of conspiracy and that petitioner failed to allege any class-based animus. On November 4, 1983, United States Magistrate Russell A.

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[2]The citation issued by the police officers charged petitioner with two misdemeanors: (1) Trespassing at the Silver Fox Grill and Lounge, and (2) being intoxicated and disruptive.

Eliason agreed that the petitioner had failed to state a claim under 42 U.S.C. §1985(3), but, taking into consideration that petitioner was proceeding pro se, he noted that petitioner could have and should have pled a violation of 42 U.S.C. §1983, and therefore deemed that petitioner's action was one under §1983. The Magistrate also refused to dismiss the claims based upon the conclusory complaint, citing the less stringent standards for pro se litigants in the Fourth Circuit. The Magistrate did order that the petitioner file a more definite statement as to the facts, with the respondent having the right to renew his motion to dismiss thereafter.

On November 25, 1983, as a result of a motion by Ellis and Cox, the Magistrate again ordered petitioner to set out in detail in a supplemental pleading the facts pertinent to the allegations of violations

of constitutional rights. After further supplemental pleadings by petitioner,[3] the respondent Mullinnix renewed his motion to dismiss, noting that petitioner had admitted that he was found guilty of the two misdemeanor violations with which he had been charged. A North Carolina state district court had found petitioner guilty and, subsequently, pursuant to an appeal and trial de novo, a North Carolina state superior court jury had found petitioner guilty. Respondent Mullinnix argued that he could not have unconstitutionally violated petitioner's constitutional rights by allegedly conspiring to falsely charge him

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[3]These supplemental pleadings by petitioner again asserted a violation of 42 U.S.C. §1985, but the Magistrate dismissed that cause of action by Order dated January 18, 1984, leaving as to respondent Mullinnix the claim of conspiring with the two police officers to maliciously charge petitioner with the crime of trespassing in violation of 42 U.S.C. §1983.

with trespassing when petitioner was convicted of that crime.

The United States Magistrate on June 22, 1984, denied respondent Mullinnix's motion to dismiss for failure to state a cause of action, but he directed at the same time that respondent submit a motion for summary judgment. Respondent Mullinnix did file a motion for summary judgment on July 16, 1984, and on August 1, 1985, the Magistrate recommended to the United States District Judge that respondent's motion for summary judgment be granted and that the action against respondent Mullinnix be dismissed. (Petitioner's Appendix, A-1). The Magistrate found, first, that the petitioner's conviction of the charges which he claimed were maliciously brought precluded his action, and second, that the petitioner had failed to present evidence contradicting respondent Mullinnix's

affidavit indicating that Mullinnix did not engage in a conspiracy with the High Point police officers, and hence, petitioner failed to come forward with evidence that respondent Mullinnix, a private citizen, acted under color of state law. On September 19, 1985, United States District Judge Richard C. Erwin agreed with the Magistrate's findings and recommendations and ordered that summary judgment be granted and respondent Mullinnix be dismissed from the lawsuit. (Petitioner's Appendix, B-1). Judge Erwin on October 15, 1985 denied petitioner's request for reconsideration of the dismissal. (Respondent's Appendix, A 1).

Petitioner subsequently moved on December 31, 1985 for relief from the District Court's order of dismissal pursuant to Rule 60(b)(3), Fed. R. Civ. P. Respondent Mullinnix opposed petitioner's motion and requested the District Court to

direct entry of a final judgment as to respondent pursuant to Rule 54(b), Fed. R. Civ. P. (Respondent's Appendix, A 3, A 9). The court did not enter such a final judgment.

Although the District Judge held a final pretrial conference on February 24, 1986, as to the remaining claims petitioner had against Ellis and Cox, the Judge at that hearing declined to hear petitioner's motion for "Relief From Court Order." (Petitioner's Appendix, C-1). On March 17, 1986, petitioner filed a notice of appeal to the United States Court of Appeals for the Fourth Circuit from the District Judge's decision not to hear petitioner's Rule 60 motion at the pretrial conference. (Respondent's Appendix, A 12).

The trial of petitioner's claims against Ellis and Cox began on March 24, 1986, the District Court having denied

petitioner's motion for a stay pending his appeal. (Petitioner's Appendix, D-1 & E-1). At the close of petitioner's evidence, on March 25, 1986, the District Court granted the remaining defendants' motion for a directed verdict, and on April 8, 1986, the court entered a judgment dismissing petitioner's action with prejudice.

The United States Court of Appeals for the Fourth Circuit dismissed petitioner's appeal for lack of jurisdiction on April 11, 1986, because the District Court's order granting summary judgment in favor of respondent Mullinnix from which petitioner appealed was not a final one,[4] the claims against Ellis and Cox having remained

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[4]The Fourth Circuit interpreted the ruling by the District Court at the final pretrial conference as one refusing to recorsider the entry of summary judgment in favor of Mullinnix.

unresolved at the time of the notice of appeal. (Petitioner's Appendix, F-1). Petitioner petitioned the Court of Appeals for rehearing on April 22, 1986, and on June 2, 1986, the Fourth Circuit denied petitioner's petition for rehearing. (Petitioner's Appendix, G-1).

Petitioner petitioned this Court for a Writ of Certiorari to review the Fourth Circuit's April 11, 1986, opinion and order dismissing petitioner's appeal, but the petition which respondent Mullinnix's counsel received August 29, 1986, was returned undocketed to petitioner on September 3, 1986 by the Office of the Clerk of the Supreme Court because of failure to comply with the Court's Rules of Procedure. On September 27, 1986, respondent Mullinnix's counsel received a subsequent petition for Writ of Certiorari from petitioner.

SUMMARY OF ARGUMENT

The petitioner's appeal to the Court of Appeals was from an order which was not final because the order did not dispose of remaining claims against co-defendants. With no entry of a final judgment pursuant to Rule 54(b), Fed. R. Civ. P., and no certification for an interlocutory appeal pursuant to 28 U.S.C. §1292(b), the Court of Appeals followed established law in dismissing the appeal, and this Court therefore should not grant the petition for a Writ of Certiorari.

ARGUMENT

1. THERE BEING NO ENTRY OF FINAL JUDGMENT PURSUANT TO RULE 54(b), FED. R. CIV. P., AND NO CERTIFICATION FOR INTERLOCUTORY APPEAL PURSUANT TO 28 U.S.C. §1292(b), THE APPEAL BY PETITIONER TO THE COURT OF APPEALS WAS INTERLOCUTORY, AND THE COURT OF APPEALS PROPERLY DISMISSED THE APPEAL.

Following the United States Magistrate's recommendations, the District Court granted respondent Mullinnix's motion for summary judgment and ordered that he be dismissed from this lawsuit. The Court was only considering Mullinnix's motion, and Ellis and Cox remained in the lawsuit as defendants. The Court's order having adjudicated the rights and liabilities of fewer than all of the parties, it was not "final." Luckett v. Spivy, 490 F.2d 87 (5th Cir. 1974); Balsbaugh v. City of Westland,

458 F.2d 1358 (6th Cir. 1972); Schnur & Cohan, Inc. v. McDonald, 328 F.2d 103, 104 (4th Cir. 1964); Rule 54(b), Fed. R. Civ. P.

A judgment is final when the district court enters a decision or order which ends the litigation, leaving nothing else to be done except executing the judgment. Catlin v. United States, 324 U.S. 229, 233, 65 S.Ct. 631, 89 L.Ed. 911, 916 (1945); Lamp v. Andrus, 657 F.2d 1167, 1168 (10th Cir. 1981). At the time of petitioner's notice of appeal, the litigation was still proceeding as to Ellis and Cox.

Even though requested to do so by respondent Mullinnix, the District Court did not direct entry of a final judgment as to respondent pursuant to Rule 54(b), Fed. R. Civ. P. With the order dismissing Mullinnix being interlocutory, the Fourth Circuit had no jurisdiction to hear petitioner's appeal under 28 U.S.C. §1291. Lamp, 657 F.2d at

1168; Moody v. Kapica, 548 F.2d 133 (6th Cir. 1976); Luckett, 490 F.2d at 87; Sanchez v. Breed, 464 F.2d 448 (9th Cir. 1972); Balsbaugh, 458 F.2d at 1358; Redding v. Walsh, 449 F.2d 1301, 1302 (3rd Cir. 1971); McDonald, 328 F.2d at 104.

Under certain circumstances, an appellate court can hear appeals involving interlocutory orders. See 28 U.S.C. §1292. See also Cohen v. Beneficial Industrial Loan Corp., 337 U.S. 541, 69 S.Ct. 1221, 93 L.Ed. 1528 (1949). However, none of the provisions of 28 U.S.C. §1292 were applicable to petitioner's appeal nor were the Cohen exceptions. Particularly, the District Court did not enter any order pursuant to 28 U.S.C. §1292(b) finding that the dismissal order or the Court's refusal to reconsider the dismissal involved a controlling question of law as to which there was substantial ground for difference

of opinion and that immediate appeal from the order would have materially advanced the ultimate termination of the litigation.

Appellate jurisdiction is initially determined as of the date the notice of appeal is filed, and therefore, all appellate jurisdictional prerequisites, including the need for a judgment to be final, must be satisfied as of that date. Lamp, 657 F.2d at 1168; TMA Fund, Inc. v. Biever, 520 F.2d 639, 642 (3rd Cir. 1975); Oak Construction Co. v. Huron Cement Co., 475 F.2d 1220, 1221 (6th Cir. 1973). With the district court's order of dismissal (and its refusal to reconsider the dismissal) not being deemed final as of March 17, 1986, the date on which the petitioner filed his notice of appeal, the Court of Appeals lacked jurisdiction to hear his appeal and properly dismissed it.

2. THE DISMISSAL OF PETITIONER'S APPEAL BY THE COURT OF APPEALS BECAUSE IT WAS INTERLOCUTORY DOES NOT INVOLVE OR PRESENT ANY SPECIAL AND IMPORTANT REASONS FOR GRANTING THE PETITION FOR A WRIT OF CERTIORARI.

The Supreme Court's decision as to whether to grant a petition for a Writ of Certiorari is purely discretionary, and the Court limits the grant of such a petition to when there are special and important reasons therefor. Rule 17.1, Supreme Court Rules. Petitioner has presented no such special and important reasons. The dismissal of petitioner's appeal did not conflict with any court of appeal's decision or with a decision of the Supreme Court, nor did it depart from the accepted and usual course of judicial proceedings, nor did it present an important question of federal law which the Supreme Court should decide. To the

contrary, the Court of Appeals applied established law in dismissing the appeal.

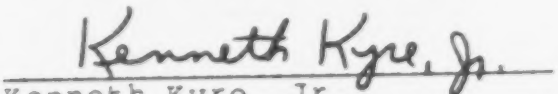
The questions presented for review by petitioner in his petition need not be considered by this Court in light of the basis of the Fourth Circuit's opinion of which petitioner now seeks review. Even if petitioner had properly brought before the Court of Appeals the issue of the District Court's refusal to grant petitioner's motion for relief under Rule 60(b)(3), petitioner has not shown any abuse of discretion by the District Court in not granting the motion. See Simons v. Gorsuch, 715 F.2d 1248, 1253 (7th Cir. 1983) (appellate court's role in reviewing the denial of a Rule 60(b) motion is to determine if the lower court abused its discretion); Montgomery v. Hall, 592 F.2d 278 (5th Cir. 1979) (movant under Rule 60(b)(3) must establish fraud by clear and convincing evidence). Therefore, even

considering the petitioner's arguments regarding Rule 60(b)(3), he has shown no special and important reason for the granting of his petition for a Writ of Certiorari.

CONCLUSION

For the foregoing reasons, the Court should deny and dismiss petitioner's petition for a Writ of Certiorari.

Respectfully submitted,



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IN THE UNITED STATES DISTRICT COURT
FOR THE MIDDLE DISTRICT OF NORTH CAROLINA
GREENSBORO DIVISION

GRAYDON ROGER BOLES, Plaintiff,	)	
V.	)	C-83-613-G
T.E. ELLIS, et al., Defendants	)	

ORDER

Plaintiff has submitted a paperwriting requesting reconsideration of this Court's Order of September 19, 1985. That Order, which affirmed the Magistrate's Findings and Recommendation of August 1, 1985, granted Dana Mullinnix's motion to dismiss and for summary judgment and dismissed him as a party to this lawsuit. After reviewing plaintiff's paperwriting, the Court in its discretion denies same.

IT IS THEREFORE ORDERED that plaintiff's paperwriting, filed October 3, 1985, requesting reconsideration of this Court's Order of September 19, 1985 be, and

the same hereby is, denied.

Richard C. Erwin
United States
District Judge

October 15, 1985

IN THE UNITED STATES DISTRICT COURT
FOR THE MIDDLE DISTRICT OF NORTH CAROLINA
GREENSBORO DIVISION
No. C-83-613-G

GRAYDON ROGER BOLES, Plaintiff, vs. T.E. ELLIS, T.D. COX, AND DANNA MULLINNIX, Defendants.	RESPONSE OF DEFENDANT DANA MULLINNIX TO PLAINTIFF'S MOTION FOR RELIEF FROM COURT ORDER, AND MEMORANDUM

The defendant Dana Mullinnix hereby responds to plaintiff's Motion for Relief from Court Order as follows:

1. On December 12, 1983, the defendant Dana Mullinnix filed in this case a Renewed Motion to Dismiss, and in apparent response thereto, the plaintiff served an objection on February 19, 1984. On July 16, 1984, defendant Mullinnix filed a motion for summary judgment, and in response thereto, the plaintiff served on August 14, 1984, his objection to the motion. Along with his

response, the plaintiff served two affidavits in support of his opposition to the motion. On August 28, 1984, the plaintiff served a third affidavit.

2. United States Magistrate Russell A. Eliason entered his Findings and Recommendation and Order on August 1, 1985, wherein he concluded that defendant Mullinnix's motions for dismissal and for summary judgment should be granted. On August 14, 1985, the plaintiff served his objection to the Magistrate's Findings and Recommendation and, in an accompanying brief, he detailed the reasons for objecting to the Findings and Recommendation. The defendant Dana Mullinnix filed on August 26, 1985, his response to the plaintiff's objections.

3. On September 19, 1985, United States District Judge Richard C. Erwin entered an order granting defendant

Mullinnix's motions to dismiss and for summary judgment pursuant to the Magistrate's Findings and Recommendation, and he dismissed defendant Mullinnix from the lawsuit.

4. By letter dated October 2, 1985, the plaintiff requested the Court to reconsider its order of September 19, 1985. United States District Judge Richard C. Erwin, by order dated October 15, 1985, denied plaintiff's request for reconsideration of the previous order.

5. The plaintiff served on December 31, 1985, a Motion for Relief from Court Order. The plaintiff styled his motion as being pursuant to Rule 60(b)(3) of the Federal Rules of Civil Procedure. That rule provides that the Court may relieve a party from a judgment or order based upon "fraud (whether heretofore denominated intrinsic or extrinsic), misrepresentation,

or other misconduct of an adverse party." Although the plaintiff styles his motion as if he were requesting relief from the Court order upon new grounds, a review of his brief served in support of his motion clearly reflects that all of the questions and arguments now advanced by plaintiff have previously been raised and considered by the Court.

6. In effect, plaintiff's current motion is simply a motion to reconsider the Court's order of September 19, 1985, which granted defendant Mullinnix's motions to dismiss and for summary judgment. The very same issues and arguments raised in plaintiff's current motion were specifically raised in plaintiff's brief in support of his objection to the Magistrate's Findings and Recommendation, and Magistrate Eliason and Judge Erwin rejected those arguments. A litigant may not use Rule 60(b) merely to

relitigate the granting of summary judgment. Frito-Lay of Puerto Rico, Inc. v. Canas, 92 F.R.D. 384, 395 (D.Puerto Rico 1981). See also Mastini v. American Telephone & Telegraph Co., 369 F.2d 378, 379 (2d Cir. 1966), cert. denied, 387 U.S. 933, 18 L.Ed.2d 994, 87 S.Ct. 2055 (1967).

7. The plaintiff has made no showing whatsoever of a reason why the Court should reconsider and change its prior rulings as to defendant Mullinnix's motions to dismiss and for summary judgment. The Court has already denied a previous request by plaintiff to reconsider its rulings. No new issues or facts have been raised by plaintiff's present motion.

8. Defendant Mullinnix incorporates herein by reference his Response to Plaintiff's Objection to Magistrate's Findings and Recommendation filed with this Court on August 26, 1985.

9. The remedy provided by Rule 60(b) "is extraordinary and is only to be invoked upon a showing of exceptional circumstances." Compton v. Alton Steamship Co., 608 F.2d 96, 102 (4th Cir. 1979). The plaintiff has failed to show such exceptional circumstances.

10. The plaintiff must show that he has a meritorious claim. Square Construction Co. v. Washington Metropolitan Area Transit Authority, 657 F.2d 68, 71 (4th Cir. 1981). The plaintiff has previously failed to convince the Court that he has a meritorious claim, and he has presented nothing new to rectify this failure.

11. Additionally, for relief under Rule 60(b)(3), the plaintiff must show clear and convincing evidence of fraud. Brown v. Pennsylvania Railroad Co., 282 F.2d 522, 527 (3d Cir. 1960), cert. denied, 365 U.S. 818, 5 L.Ed.2d 696, 81 S.Ct. 690 (1961). Fraud,

misrepresentation, or other misconduct is not to be presumed. 7 Moore's Federal Practice, ¶60.24[5], at p. 60-217 (2d Ed. 1985). The plaintiff has failed to present any evidence of any alleged fraud or misrepresentation which would justify the Court to reverse its prior decisions dismissing defendant Mullinnix as a party to this lawsuit.

12. In the interest of finally concluding this case as to defendant Mullinnix, said defendant requests the Court to not only deny plaintiff's present motion which seeks relief from the Court's prior order, but he also requests the Court to enter an order containing an express determination that there is no just reason for delay for entry of a final judgment and containing an express direction for the entry of final judgment as to defendant Dana Mullinnix, pursuant to Rule 54(b) of the

Federal Rules of Civil Procedure.

13. Finally, because the plaintiff has failed to raise any new issues or present any new arguments in his most recent motion, and because it is, in effect, merely a motion for reconsideration of the Court's order of September 19, 1985, which the Court has already refused to reconsider, it is requested that, pursuant to Rule 11 of the Federal Rules of Civil Procedure, and 42 U.S.C. §1988, the Court award defendant Mullinnix his attorneys' fees and expenses incurred in opposing plaintiff's latest motion.

WHEREFORE, the defendant Dana Mullinnix respectfully requests the Court to grant the relief requested in paragraphs 12 and 13 above.

This the 22nd day of January, 1986.

G. Marlin Evans

Kenneth Kyre, Jr.

Attorneys for Defendant
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OF COUNSEL:

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A 12

IN THE UNITED STATES DISTRICT COURT
FOR THE MIDDLE DISTRICT OF NORTH CAROLINA
GREENSBORO DIVISION

[FILED MAR 17 1986]

GRAYDON ROGER BOLES, Plaintiff,	)	
	)	Civil Action
V.	)	File Number
	)	C-83-613-G
T.E. ELLIS, et al., Defendants	)	

NOTICE OF APPEAL

Notice is hereby given that Graydon Roger Boles plaintiff above named hereby appeals to the United States Court of Appeals for the Fourth Circuit from the order denying consideration of the Rule 60 (F.R.Civ.P.) request entered in this action on the 24th day of February, 1986.

This the 8th of March, 1986

Graydon Roger Boles
10117 North Tenth Street
Tampa, Fla 33612
(813) 972-3093

28 U.S.C. §1291:

The courts of appeals (other than the United States Court of Appeals for the Federal Circuit) shall have jurisdiction of appeals from all final decisions of the district courts of the United States, the United States District Court for the District of the Canal Zone, the District Court of Guam, and the District Court of the Virgin Islands, except where a direct review may be had in the Supreme Court. The jurisdiction of the United States Court of Appeals for the Federal Circuit shall be limited to the jursidiction described in sections 1292(c) and (d) and 1295 of this title.

28 U.S.C. §1292(b):

When a district judge, in making in a civil action an order not otherwise appealable under this section, shall be of the opinion that such order involves a controlling question of law as to which there is substantial ground for difference of opinion and that an immediate appeal from the order may materially advance the ultimate termination of the litigation, he shall so state in writing in such order. The Court of Appeals which would have jurisdiction of an appeal of such action may thereupon, in its discretion, permit an appeal to be taken from such order, if application is made to it within ten days after the entry of the order: Provided, however, That application for an appeal hereunder shall not stay proceedings in the district court unless the district judge or the Court of Appeals or a judge thereof shall so order.

Rule 54(b), Federal Rules of Civil Procedure:

When more than one claim for relief is presented in an action, whether as a claim, counterclaim, cross-claim, or third-party claim, or when multiple parties are involved, the court may direct the entry of a final judgment as to one or more but fewer than all of the claims or parties only upon an express determination that there is no just reason for delay and upon an express direction for the entry of judgment. In the absence of such determination and direction, any order or other form of decision, however desig- nated, which adjudicates fewer than all the claims or the rights and liabilities of fewer than all the parties shall not terminate the action as to any of the claims or parties, and the order or other form of decision is subject to revision at any time before the entry of judgment adjudicating all the claims and the rights and liabilities of all the parties.

CERTIFICATE OF SERVICE

I hereby certify that the foregoing Brief of Respondent in Opposition to Petition was served upon the petitioner and respondents Ellis and Cox on October 24, 1986, pursuant to Supreme Court Rules 22.1, 28.3, and 28.5(b) by depositing copies thereof in a United States post office with first-class postage prepaid, addressed as follows:

Mr. Graydon Roger Boles
10117 North Tenth Street
Tampa, Florida 33612
(Petitioner, pro se)

Mr. J. Reed Johnston, Jr.
Tuggle, Duggins, Meschan & Elrod
Post Office Drawer X
Greensboro, N.C. 27402
(Attorney for Respondents
Ellis and Cox)

This 24nd day of October, 1986.

Kenneth Kyre, Jr.

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